SUPREME

No. 73-745

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MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH DIVARCO AND JOSEPH ARNOLD,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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After a jury trial in the United States District Court for the Northern District of Illinois, each petitioner was convicted in 1972 of making and subscribing a false statement on his 1965 tax return under penalty of perjury in violation of Section 7206(1) of the Internal Revenue Code of 1954, and of conspiracy to report a false source of income in violation of 18 U.S.C. 371. Each petitioner was sentenced to concurrent sentences of one year imprisonment on the conspiracy count and five years' probation on the substantive counts (Pet. App. 1, 2).

Petitioner Arnold asserts that the government improperly introduced evidence for purposes of impeachment of his two prior felony convictions. Both petitioners urge that misrepresentation of the source of income, but not the amount, is not a "false statement" under Section 7206(1).

1. Each petitioner was convicted of falsely subscribing on his income tax return for 1965 that Chemical Mortgage and Investment Corporation was a source of a portion of his income. According to the testimony (Tr. 278, 290, 324-327, 426-429, 590)[1] of the government witness Davis, who had access to the records of Chemical Mortgage and Investment Corporation, and the government's summary of evidence (Govt. Exs. 24, 25, 26) tracing its expenditures for 1965, neither petitioner had income from that corporation. Davis testified that petitioner Arnold repeatedly requested permission to use Chemical Mortgage and Investment Corporation as a reportable source of income for himself and DiVarco (Tr. 430-433). Davis further testified that he subsequently provided false W-2 forms at Arnold's request (Tr. 436-438, 1005).

Only petitioner Arnold took the stand. He denied Davis' testimony and stated that the W-2 forms from Chemical Mortgage and Investment Corporation used by himself and petitioner DiVarco were issued for profits on investments made by them (Tr. 997-998). Evidence of Davis' prior criminal convictions was introduced by petitioners in order to impeach his testimony. In order to give a balanced presentation of the relative credibility of Davis and petitioner Arnold, the district court ruled that the government could attempt to impeach Arnold's testimony by introducing evidence of petitioner Arnold's respective 1935 and 1948 convictions for postal extortion and interstate transportation of a motor vehicle knowing that it had been stolen. However, with respect to this evidence the district court gave the jury a cautionary instruction (Pet. App. 13-14).

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[1] "Tr." references are to the transcript of trial proceedings. "Ex." references are to exhibits introduced at trial.

The court of appeals noted that both of Davis' convictions were for theft, "which is 'universally regarded as conduct which reflects adversely on a man's honesty' " (Pet. App. 13). Under these circumstances, where the verdict would depend upon the jury's assessment of the credibility of Davis and petitioner Arnold, the court of appeals found that the district court had not abused its discretion in allowing the introduction of evidence of Arnold's prior conviction for impeachment purposes (Pet. App. 14).

2. As the court of appeals correctly stated (Pet. App. 12), there is no absolute period of limitations with respect to prior convictions in order to impeach the testimony of a defendant who takes the stand in his own behalf. While Rule 609(b) of the Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates suggests a ten year limitation on the admission of a prior criminal conviction, the court of appeals noted (Pet. App. 11) that those rules have not yet become effective. The fact that the Seventh Circuit had adhered to the guidelines of Proposed Rule 609(b) in *United States* v. *McCarthy,* 445 F. 2d 587, did not, as petitioner Arnold contends (Pet. 4-6), require it to apply the Proposed Rule here.[2]

Since there is no fixed cut off period, the court of appeals properly employed the test of "whether the trial judge believes that the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility" (Pet. App. 12). See *Gordon* v. *United States,* 383 F. 2d 936, 939-940 (C.A. D.C.), certiorari denied, 390 U.S.

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[2] Moreover, in *McCarthy,* the defendant had received a full pardon with respect to the prior conviction.

1029. Such a test is well within this Court's observation in *McGautha* v. *California,* 402 U.S. 183, 215, that:

> It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. See *Spencer* v. *Texas,* 385 U.S., at 561; cf. *Michelson* v. *United States,* 335 U.S. 469 (1948); * * *.

In *McGautha,* the Court also cited *United States* v. *Palumbo,* 401 F. 2d 270 (C.A. 2), certiorari denied, 394 U.S. 947. There, the testimony of a witness was impeached by evidence of five convictions which were between 21 and 38 years old. Introduction of such prior convictions was held to be within the discretion of the trial judge. Similarly, here, where evidence of the prior convictions of the government witness for theft was first introduced by petitioners for impeachment purposes, the district court did not abuse its discretion in thereafter admitting evidence of Arnold's prior convictions for essentially similar offenses reflecting upon his basic honesty.

3. Petitioners further contend (Pet. 7-8) that their misrepresentation as to the source of their income is not a "false statement" within the meaning of Section 7206 (1) of the Code. They urge (Pet. 7-8) that "[o]nly income tax cases are contemplated under Title 26, Section 7206(1) and, therefore, there must be, for example, a false understatement of income, a false overstatement of deductions, a false understatement of capital gains, a false overstatement of capital losses, or the false reporting of a long term capital gain where, in fact, a short term capital gain occurred."

But by its terms, Section 7206(1) reaches every material falsehood, intentionally made, in a return or other document, subscribed under penalty of perjury. Indeed, petitioners concede (Pet. 8) that there is an overlap between 18 U.S.C. 1001 and Section 7206(1) and that in a proper case the government may choose between the two statutes in bringing a prosecution. See *United States* v. *Rayor,* 204 F. Supp. 486, 490 (S.D. Cal.), affirmed, 323 F. 2d 519 (C.A. 9), certiorari denied, 375 U.S. 993.

Contrary to petitioners' assertion (Pet. 7), they are not the first persons to be convicted under Section 7206(1) for a false statement not relating to their tax liability. For example, in *Jaben* v. *United States,* 349 F. 2d 913, 915-916 (C.A. 8), a false statement upon an application for an extension of time within which to file a tax return was held to be sufficient to support a conviction under Section 7206(1). See also *United States* v. *Willoz,* 449 F. 2d 1321, 1322, 1325 (C.A. 5), where the omission of an additional business address on a special wagering tax return was held to be a false statement within the meaning of Section 7206(1). Moreover, numerous circuits have held that the existence of a tax deficiency is not a prerequisite for a conviction for a false statement under Section 7206(1). The purpose of Section 7206(1) is to impose a penalty for perjury upon those who willfully make false statements on returns or other documents regardless of whether the falsehood has any tax consequences.. See, *e.g., Gaunt* v. *United States,* 184 F. 2d 284, 288 (C.A. 1), certiorari denied, 340 U.S. 917; *United States* v. *Tadio,* 223 F. 2d 759 (C.A. 2), certiorari denied, 350 U.S. 874; *United States* v. *Jernigan,* 411 F. 2d 471 (C.A. 5); *United States* v. *Lodwick,* 410 F. 2d 1202

(C.A. 8); *Schepps* v. *United States,* 395 F. 2d 749 (C.A. 5), certiorari denied, 393 U.S. 925; *United States* v. *Engle,* 458 F. 2d 1017 (C.A. 8).

For the reasons stated, it is respectully submited that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JANUARY 1974.